Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In re: Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilitie LLC Petition for a Declaratory Ruling	DA-16-1427 WT Docket No. 16-421

REPLY COMMENTS OF THE CITY AND COUNTY OF SAN FRANCISCO

DENNIS J. HERRERA
City Attorney
THERESA L. MUELLER
Chief Energy and Telecommunications Deputy
WILLIAM K. SANDERS
Deputy City Attorney
City Hall, Room 234
1 Dr. Carlton B. Goodlett Place
San Francisco, California 94102-4682
Telephone: (415) 554-6771
E-Mail: william.sanders@sfgov.org

Attorneys for
CITY AND COUNTY OF SAN FRANCISCO

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I. EXECUTIVE SUMMARY

The City and County of San Francisco ("San Francisco" or "City") submits these reply comments on the Public Notice re Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilitie LLC Petition for a Declaratory Ruling ("Public Notice") issued by the Federal Communications Commission ("Commission" of "FCC") Wireless Telecommunications Bureau ("Bureau").

The telecommunications carriers and industry associations filing comments in the proceeding ("Carrier Commenters") ask the Commission to address a host of issues related to local government regulation that they contend will stymie their deployment of critical 5G technology. Among other things, the Carrier Commenters have asked the Commission to: (i) define a "small wireless facility" or "small cell" to include equipment that would be anything but small;[1] (ii) broadly construe the scope of preemption under section 253(a), while limiting the scope of the section 253(c) safe harbor; (iii) regulate the fees local governments can charge wireless carriers for use of their streetlight and other poles; (v) require local governments to allow the installation of small cell facilities on streetlight and other poles; and (vi) deem applications for small cell facilities granted when local governments do not make final determinations within 60 days.

San Francisco supports the Commission's efforts to expedite the deployment of wireless broadband facilities and has expended substantial resources to develop permitting and licensing schemes that do not impede development of new technologies and services. The Commission should ensure that local governments can continue to both address local concerns in the siting process and protect the public health, safety, and welfare. Furthermore, the Commission should not regulate either access to government-owned infrastructure to install

[1] While San Francisco will use the term "small cells" here, it was worth noting that the use of this term to describe the size of the antennas or other equipment is a misnomer. The term actually describes the size of the area served by the facility. *See* Public Notice at 3 fn. 16.

and maintain small cell facilities, or the fees local governments charge for use of their infrastructure for this purpose.

II. SAN FRANCISCO'S RESPONSE TO COMMENTS MENTIONING SAN FRANCISCO

A. San Francisco Has Granted ExteNet Hundreds of Permits to Install Wireless Facilities on Existing Poles in the Public Right-of-Way

In its comments, ExteNet Systems, Inc. attempts to summarize and explain "the permitting and attachment agreement issues with regard to wireless facility deployment in a *large western city*."[2] That city is clearly San Francisco.

ExteNet has successfully deployed hundreds of its wireless facilities on existing poles in San Francisco's public right-of-ways. As ExteNet admits, through it all "ExteNet has been able to deploy in the city despite the delays, barriers and discrimination it has faced."[3] ExteNet has not substantiated these claims. In fact, San Francisco's records show that ExteNet obtained the following wireless facility permits since 2009:

Year Approved	Number of Permits
2009	3
2010	18
2011	16
2012	7
2013	1
2015	174
2016	116
2017	18
Total	353

This is hardly an example of a situation in which a local government erected barriers to the deployment of wireless facilities. Rather, it shows how local governments can allow for deployment while ensuring that local interests are accounted for in the permitting process.

[2] ExteNet Comments at 15 (emphasis added).
[3] ExteNet Comments at 15, fn 12.

1. ExteNet Is an Active Participant in San Francisco's Pole Licensing Programs

ExteNet is correct that it took San Francisco a while to decide to license use of its poles to wireless carriers.[4] Two different City agencies owned these poles, which are used for important municipal purposes, and those agencies needed to be sure that installing wireless facilities would neither damage the poles nor hinder the City's use of those poles. After extensive negotiations with ExteNet and other carriers, in 2014 both the San Francisco Public Utilities Commission ("SFPUC"), which owns the City's streetlight poles, and the San Francisco Municipal Transportation Agency ("SFMTA"), which owns poles that support its electric bus and trolley system, agreed to license their poles to any telecommunications carrier willing to sign their form license agreements. This provides carriers like ExteNet access to –- poles owned by these agencies.

It is also true that San Francisco's license fees are $4,000 per pole, which ExteNet and a number of other carriers have agreed to pay. Those costs are fair and reasonable for a number of reasons. These are valuable City assets that are expensive to install and maintain. Unlike wooden utility poles, which cost a few hundred dollars per pole,[5] a standard streetlight pole in San Francisco costs $1,388, a concrete streetlight pole cost $3,100, and other special streetlight poles that can cost as much as $10,000 (not including installation costs). SFMTA spends as much as $10,000 on each of traffic signal pole and traction poles (including installation costs). Requiring for-profit businesses that make use of these poles to pay fees that reflect the value to the carriers and cost to the City of these connections is reasonable and expected by the taxpaying citizens of San Francisco expect.

Despite ExteNet's complaints about delay and costs, ExteNet has been a willing participant in the City's pole licensing programs. In fact, ExteNet has obtained more licenses to use City-owned poles than any other licensee. In just two years, ExteNet applied for 279 pole

[4] ExteNet Comments at 16.
[5] *See* http://www.americantimberandsteel.com/poles-pilings-utility-poles-unframed-cca.html

licenses from the SFPUC and obtained 77 licenses. There are still 193 pending applications, while nine were either disapproved or abandoned. ExteNet also applied for 137 pole licenses from the SFMTA and obtained 79 licenses. There are still 68 pending applications.

2. The Majority of ExteNet's Applications for Wireless Permits Have Been Approved without Any City Hearings—Let Alone Two or Three Hearings as ExteNet Claims

ExteNet claims that it is "common" for San Francisco to hold two or three hearings on each one of its applications for wireless facility permits before approving those permits.[6] While two hearings are certainly possible, as shown below that has not been the case for ExteNet.

San Francisco's permitting process requires the issuance of a "Tentative Approval" by its Public Works Department, which can be protested by local residents. If a protest is filed, a hearing must be held. If no protest is filed, Public Works will approve the permit without any hearing. After the permit is issued, under the San Francisco Charter the permit may be appealed. The second hearing would follow an appeal of the permit to San Francisco's Board of Appeals.

Most of ExteNet's applications have not required even one hearing—let alone two or three. City records show that of ExteNet's approved applications for wireless facility permits only 101 (or 34%) were protested and that, following the protest hearing, Public Works approved each of those 101 applications. City records also show that only nine of ExteNet's 310 permits (3.4%) were appealed and that the Board of Appeals upheld seven of those permits. ExteNet withdrew the other two permits and reapplied.

[6] ExteNet Comments at 16.

3. Most of ExteNet's Applications Were Reviewed by Three City Departments; Public Works Does Not Reject Applications for Typographical Errors

ExteNet claims that "at least four city departments" must review each of its applications for a wireless facility permit.[7] This is simply not true. While there are four City departments involved in the permitting process, most permits are only reviewed by three departments.

Public Works reviews every application for completeness. The Department of Public Health will confirm that the proposed wireless facility complies with Commission standards for radio frequency emissions and City noise standards. The Planning Department will review most applications to determine compliance with the City's compatibility standards.[8] If a proposed location is near a park or open space, which is usually not the case, the Recreation and Park Department will need to review it for compliance with the applicable compatibility standard.

Further, these reviews take place simultaneously. Public Works will notify ExteNet within 30 days whether the application is complete. If the application is incomplete, Public Works will issue a notice of incompleteness and advise ExteNet what information Public Works still needs to process the application. At the same time, Public Works will notify the other reviewing departments that it has received the application.

Finally, ExteNet's claim that San Francisco will deny permit applications for "immaterial typos"[9] is simply not the case. Rather, San Francisco will notify ExteNet that its application is incomplete when necessary information is missing or incorrect. As the Bureau knows, such

[7] ExteNet Comments at 16.
[8] ExteNet also complains about the amount of time it takes the Planning Department to conduct its environmental review. ExteNet Comments at 16. Under California law, San Francisco must conduct an environmental review of ExteNet's applications for wireless facility permits. As shown in Exhibit A attached hereto, these reviews are generally done in batches. Planning Department records show that delays in completing environmental review are largely due to ExteNet's failure to file complete applications or timely respond to the Planning Department's requests for additional necessary information.
[9] ExteNet Comments at 16.

notices are necessary to stop the running of the shot clock. Public Works has found that has many as 80% of ExteNet's applications are incomplete.

4. The Planning Department's Review Comes before the Tentative Approval, Not during the Protest or Appeal

ExteNet states that the Planning Department can scuttle an application by making a subjective determination that a proposed wireless facility would cause an "'obstruction of a public view.'" According to ExteNet, this can occur at any stage of the process, including during the protest hearing or even on appeal.[10] That is not how the process actually works.

Under San Francisco law, the Planning Department can recommend that Public Works deny an application for a wireless facility permit on a "view street" if the Planning Department finds that the proposed wireless facility "would significantly impair the views of any of the important buildings, landmarks, open spaces, or parks that were the basis for the designation of the street as a view street." However, the Planning Department must make that determination when it reviews the application—not during a protest hearing or on appeal.[11]

Nonetheless, review by the Planning Department has not impeded ExteNet's deployment. In fact, Planning Department recommendations of disapproval of an application for a wireless facility permit have been infrequent. In part, this is because the Planning Department has worked with ExteNet and other applicants to develop designs that the Planning Department has determined meet the City's compatibility standard. Where the applicant uses these approved designs, the Planning Department's approval becomes a mere formality.

[10] ExteNet Comments at 17.

[11] The City cannot control the issues that members of the general public might raise during a protest or appeal. With that said, San Francisco is not aware of any instance in which public concerns over "views" raised during a protest or appeal have led to the City denying an application for a wireless facility permit where the Planning Department had recommended approval.

5. San Francisco Does Not Limit the Size of Equipment to be Installed on Utility Poles

ExteNet claims that the City restricts the size of equipment that ExteNet and other telecommunications carriers may install as part of a wireless facility, whether the proposed facility would be on a utility pole or City-owned pole. According to ExteNet, on utility poles the City "has not allowed anything more than two remote radio units and an approximately two-foot long canister antenna" along with a "small power disconnect switch box." [12] This assertion is false with respect to utility poles.

Attached to these comments as Exhibit B is a copy of plans submitted by Crown Castle for a wireless permit that San Francisco approved in 2015. These plans are for a standard equipment configuration that Crown Castle has installed in many locations. It includes the following equipment:

- An Amphenol antenna that is 53 x 14.6 inches (*see* Exhibit C attached hereto)
- An Andrew equipment cabinet that is 32.2 x 9.6 x 8.6 inches
- Two small boxes consisting of a low voltage conversion box and transformer
- An Andrew power supply on adjacent pole that is 32.7 x 6.1 x 5.8 inches
- A disconnect switch and meter on the second pole

In fact, ExteNet has obtained permits for and deployed many wireless facilities on utility poles in San Francisco that have equipment larger than mentioned in its comments. This can be seen in the spreadsheet attached to these comments as Exhibit D. It contains photographs of a number of permitted and deployed ExteNet wireless facilities in San Francisco, many of which have equipment larger than what ExteNet claims the City would prohibit.

6. San Francisco Properly Notified ExteNet of Certain Deficiencies in its Construction of its Permitted Wireless Facilities

As a permitting agency, Public Works has the responsibility to the public to inspect permitted wireless facilities to ensure that the permittee installed the permitted wireless facilities in the manner required by the permits. Last year, Public Works learned that ExteNet

[12] ExteNet Comments at 17.

had failed to install some 23 separate wireless facilities in a manner inconsistent with the plans submitted to and approved by Public Works. As ExteNet notes, some of those deficiencies included using the wrong disconnect switch,[13] but others concerned installing the equipment on the wrong side or the pole, failing to center the antenna at the top of the pole, and installing a different model antenna.[14]

Public Works notified ExteNet of these deficiencies and required ExteNet to correct them within 30 days, or Public Works would delay processing additional applications for wireless permits. Because ExteNet corrected the deficiencies, Public Works did not invoke its authority to delay processing ExteNet's applications.

B. B. Complaints that San Francisco's Permitting Requirements for Small Cell Facilities are Discriminatory Are Unsupported

The Wireless Infrastructure Association ("WIA"), T-Mobile and Crown Castle all complain that San Francisco discriminates against small cell facilities, because San Francisco requires telecommunications providers installing wireless facilities on utility poles to obtain discretionary permits, but does not require similar permits from "wireline telecommunications providers, the cable operator, or the electric utility."[15] As WIA notes, T-Mobile, Crown Castle, and ExteNet filed a lawsuit in state court challenging San Francisco's permitting requirement for wireless facilities in the public right-of-way under two state laws, one of which required that San Francisco treat "'all entities in an equivalent manner."[16] The trial court found that "'the pieces of equipment, including antennas, installed on utility poles in the public right-of-way by Plaintiffs are generally similar in size and appearance to the pieces of equipment installed on

[13] ExteNet Comments at 17.
[14] A copy of the notice and spreadsheet identifying the deficiencies is attached as Exhibits E and Exhibit D. As the spreadsheet shows, the disconnect switch ExteNet installed was larger than the one Public Works approved. Ultimately, however, the Planning Department agreed that the installed disconnect switch was acceptable and approved its use.
[15] WIA Comments at 58; *see* T-Mobile Comments at 2-3; Crown Castle Comments at 15.
[16] WIA Comments at 58; *see* Cal. Pub. Util. Code § 7901.1(b).

utility poles in the public rights-of-way by other right-of-way occupants, including but not limited to PG&E, Comcast, and AT&T.'"[17]

The carriers fail to explain the factual context that made the trial court's ruling erroneous. The trial court incorrectly compared a single piece of equipment used by the Plaintiffs with a similar piece of equipment used by cable and landline carriers and a Pacific Gas and Electric Company transformer. Those boxes and the transformers are comparable to only one component of Plaintiffs' facilities—the equipment cabinet. In addition to the equipment cabinet, Plaintiffs' wireless facilities typically include one or more antennas, an electric meter and cut-off switch, and sometimes a separate cabinet containing a battery back-up unit.[18]

The carriers also fail to note that both the trial court and the Court of Appeal ruled for San Francisco on Plaintiffs' claim. That decision is not final, however, because the California Supreme Court granted review, which is pending.[19]

III. SAN FRANCISCO'S REPLY COMMENTS ON POTENTIAL ISSUES TO ADDRESS IN A DECLARATORY RULING

A. The Commission Should Not Endorse the Size Limits Proposed by the Carrier Commenters for "Small Cell" Facilities

Whether the Commission determines that it is appropriate to establish an objective definition of a "small cell facility" is of critical importance to San Francisco and other local governments. The Commission should not endorse the standards for a small cell facility proposed by the Carrier Commenters

[17] WIA Comments at 58, quoting *T-Mobile West Corp. v. City & Cnty. of San Francisco*, No. CGC-11-510703, at 8 (Super. Ct. S.F. Cnty. Nov. 26, 2014) (trial court statement of decision).
[18] Attachments F is photograph that was an exhibit at trial. It is a good example of the evidence that trial court relied on to make that determination. On the pole on the left of the photograph is an ExteNet wireless facility and on pole on the right are a PG&E transformer and a battery back-up unit owned by Comcast or AT&T. It is not generally the case that the PG&E transformer and the battery back-up unit are on the same pole.
[19] *T-Mobile West Corp. v. City & Cnty. of San Francisco*, 3 Cal.App.4th 334, 208 Cal.Rptr.3d 248, 268-89 (2016), *review granted*, 211 Cal.Rptr.3d 259 (Dec. 21, 2016).

The WIA would define a "small wireless facility" on a utility pole to include: (i) one or more antennas each of which would not exceed six cubic feet in volume; and (ii) other associated wireless equipment that would be "cumulatively no more than 28 cubic feet in volume." In addition, under WIA's definition the "electric meter, concealment elements, telecommunications demarcation box, ground-based enclosures, grounding equipment, power transfer switch, cut-off switch, and vertical cable runs" all would "not [be] included in the calculation of equipment volume."[20]

According to WIA, these specifications "use the volumetric definition" contained in the Commission's First Amendment to the Nationwide Programmatic Agreement for Collocation of Wireless Facilities ("Amended Programmatic Agreement").[21] That claim is misleading. The Amended Programmatic Agreement established the following volumetric requirements: (i) each "antenna"[22] must be no more than three cubic feet and "all antennas" may be up to six cubic feet; and (ii) "all other associated equipment" may not "cumulatively exceed" 21 cubic feet on "all pole structures."[23]

By any objective standard, there is nothing "small" about the small cell facilities WIA believes its members should be permitted to install on utility poles with little or no local government review or control.[24] Moreover, the Commission must not lose sight of the fact that

[20] WIA Comments at 1 fn.2.
[21] First Amendment to the Nationwide Programmatic Agreement for Collocation of Wireless Facilities, 31 FCC Rcd 8824, 8829 (2016). 16 U.S.C. §§ 470, *et seq*. The purpose of the Amended Programmatic Agreement was to streamline the review of the effect of the collocation of wireless facilities on historic properties by acting as a "substitute" for review of each collocation under Section 106 of the National Historic Preservation Act (16 U.S.C. §§ 470, *et seq*.). *See* Recitals to Amended Programmatic Agreement.
[22] The Amended Programmatic Agreement includes the following equipment within the definition of the word "antenna" so they would be part of the volumetric limits: "any on-site equipment, switches, wiring, cabling, power sources, shelters or cabinets associated with that antenna and added to a Tower, structure, or building as part of the original installation of the antenna." Amended Programmatic Agreement § 1.A. The WIA would exclude this equipment from the volumetric limits.
[23] Amended Programmatic Agreement § VII.B.2-3.
[24] As other commenters have pointed out, Mobilitie seems to believe that installing whatever equipment it needs on a 120-foot pole is a small cell facility.

under Section 6409(a) of the Spectrum Act local governments would be required to approve requests to increase the size of these permitted facilities.[25] For that reason, the size of an approved small cell could be readily increased without any local government control.

The Commission should not approve a standard that would grant WIA's members virtually an unfettered right to decide what equipment is appropriately installed on utility and other poles in the public right-of-way.

B. The Commission Should Not Reconsider its Construction of Section 253(a)

San Francisco and other local governments filing opening comments do not see the need for the Commission to issue a declaratory ruling for the purpose of construing 47 U.S.C. § 253(a).[26] The Carrier Commenters, by contrast, generally ask the Commission to take another look at section 253(a) and adopt a new construction of that section that would make it easy for the Commission or a court to preempt virtually any local regulation over construction of small cell facilities in the public right-of-way.[27]

For example, AT&T asks the Commission to find that "State and local action that constrains service providers' ability to compete in the provision of quality wireless service falls squarely within Section 253's prohibitions" as do "aesthetic requirements [that] are excessively vague and subjective."[28] Verizon suggests that the standard should be that a "local regulation presents a 'substantial barrier' to, and therefore has the 'effect of prohibiting,' the provision of telecommunications services where it (1) significantly increases the carrier's costs; or (2)

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[25] Middle Class Tax Relief and Job Creation Act of 2012 ("Spectrum Act"), Pub. L. No. 112-96, 126 Stat. 156, § 6409(a) (2012) (codified at 47 U.S.C. § 1455(a)).
[26] City and County of San Francisco Comments at 14-25; Texas Cities Comments at 16-17; f Smart Communities Siting Coalition Comments at 50-69; League of Arizona Cities and Counties, et al. Comments at 24-29; Virginia Cities Comments at 34-54.
[27] Most of Carrier Commenters just assume that section 253(a) applies to them and their facilities, without citing any caselaw supporting that argument. As San Francisco and other commenters noted that assumption is incorrect, because the Telecommunications Act of 1996 Congress expressly limited claims related to wireless facility siting to 47 U.S.C. § 332(c)(7). San Francisco Comments at 17-18; Texas Cities Comments at 11-12.
[28] AT&T Comments at 9, 16.

otherwise meaningfully strains the ability of a carrier to provide telecommunication services."[29] WIA argues that any delay in approving an application for a single permit to install a small cell facility is an effective prohibition under sections 253(a)—presumably regardless of how may existing facilities the provider has deployed.[30] Crown Castle argues that a prohibition occurs when a provider that is already offering service is "unable to *improve* or *expand* existing service."[31] T-Mobile asks the Commission to declare that an "onerous application process" is an "effective prohibition."[32]

These arguments ignore the common-sense approach the Commission has applied for 20 years to construe section 253(a). This approach has allowed local governments to appropriately address local concerns while allowing enormous expansion of facilities to provide telecommunications services. As the Commission has held, preemption under section 253(a) requires a finding that a local ordinance "would have to actually prohibit or effectively prohibit" the provision of telecommunications services.[33] The mere *possibility* of a prohibition—due to delays, increased costs to compete, less than perfect service quality, or the denial of an application for a single permit for a small cell—would not meet the standard.

ExteNet[34] and the WIA[35] long for the day when the Ninth Circuit used an ellipsis to alter the meaning of section 253(a), but that approach was soundly rejected. The Ninth Circuit held in *City of Auburn v. Qwest Corp*.: "Section 253(a) preempts 'regulations that not only 'prohibit' outright the ability of any entity to provide telecommunications services, but also those that 'may **. . .** have the effect of prohibiting' the provision of such services.'" [36] In light of that

[29] Verizon Comments at 12 (footnotes omitted).
[30] WIA Comments at 56.
[31] Crown Castle Comments at 32 (emphasis in original).
[32] T-Mobile Comments at 19.
[33] *In re California Payphone Ass'n*, 12 F.C.C.R. 14191, 14209 (1997); see also *Level 3 Commc'ns, L.L.C. v. City of St. Louis*, 477 F.3d 528 (8th Cir. 2007).
[34] WIA Comments at 47-50.
[35] ExteNet Comments at 26-29.
[36] *City of Auburn v. Qwest Corp*., 260 F.3d 1160, 1176 (2001) (alteration in original), overruled by, *Sprint Telephony PCS, L.P. v. City of San Diego,* 543 F.3d 571 (9th Cir. 2008).

construction, until the Ninth Circuit *en banc* in *Sprint Telephony PCS, L.P. v. City of San Diego* overruled *City of Auburn*, district courts in the Ninth Circuit routinely preempted local ordinances based on facial challenges under section 253(a).[37] The Ninth Circuit's construction of section 253(a) in *City of Auburn* required the district courts to find that section 253(a) preempted on its face local regulations that "'might possibly'" prohibit the provision of telecommunications services.[38]

City of Auburn's impact can be seen from the district court's decision in *NextG Networks of California, Inc. v. City and County of San Francisco*. There, the district court found that section 253(a), as construed by *City of Auburn*, preempted San Francisco's ordinance requiring a permit to install wireless facilities on utility poles even though: (1) the application process was "relatively basic, streamlined, and inexpensive"; (2) no public hearings were required as part of the application process; and (3) there were no potential "civil or criminal penalties for failure to comply with the regulations.[39] When the Ninth Circuit overruled *City of Auburn* the district court on reconsideration upheld the City's ordinance, finding that "[u]nder the interpretation of § 253(a) set forth in *Sprint Telephony*, the City Regulations, on their face, are not preempted under 47 U.S.C. § 253(a)."[40] The proceedings in that case leave little doubt as to why WIA and ExteNet have asked the Commission to adopt *City of Auburn*.

The Commission's prior decisions construing section 253(a) are not in accord with *City of Auburn*, and no other circuit court has ever followed *City of Auburn*, even before the Ninth Circuit *en banc* overruled that decision. There is no reason whatsoever that the Commission should at this time adopt this outlier construction of section 253(a).

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[37] See *NextG Networks of Cal., Inc. v. Cty. of Los Angeles*, 522 F.Supp.2d 1240, 1248-54 (C.D. Cal. 2007) (citing cases).
[38] *Sprint Telephony PCS, L.P. v. Cty. of San Diego*, 543 F.3d 571, 578 (9th Cir. 2008); see also see also *Level 3 Commc'ns, L.L.C. v. City of St. Louis*, 477 F.3d 528 (8th Cir. 2007).
[39] *NextG Networks of Cal., Inc. v. City and Cty. of San Francisco*, 2008 WL 2563213, at **8-9 (2008), *amended and vacated in part on reconsideration*, 2009 WL 5469914 (N.D. Cal. 2009).
[40] *NextG Networks of Cal., Inc. v. City and Cty. of San Francisco*, 2009 WL 5469914 at *1 (N.D. Cal. 2009).

C. The Carrier Commenters Fail to Recognize that Section 253(c) Saves from Preemption Local Regulations that Manage the Public Right-of-Way

Section 253(c) provides as follows:

> **(c) State and local government authority**
>
> Nothing in this section affects the authority of a *State or local government to manage the public rights-of-way* or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.[41]

It is well settled that section 253(c) provides a "safe harbor" for local regulations that are preempted by section 253(a), provided those local regulations: (i) concern local management of the public rights-of-way; or (ii) "require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis."[42] As the Eighth Circuit explained:

> Subsection (a), a rule of preemption, articulates a reasonably broad limitation on state and local governments' authority to regulate telecommunications providers. Subsection (c) begins with the phrase "Nothing in this section affects" and then enumerates various protected state and local government acts. Thus, section 253(a) states the general rule and section 253(c) provides the exception-a safe harbor functioning as an affirmative defense-to that rule.[43]

Many of the Carrier Commenters provide the Commission with a litany of complaints concerning how local governments purportedly rely on public right-of-way management regulations to restrict the installation of small cell facilities in the public right-of-way. AT&T complains about limitations on where small cell facilities can be located or what they look like often. According to AT&T, local aesthetic concerns can be a "mere subterfuge for rejecting wireless facility placements due to concerns about RF safety."[44] Mobilitie argues that section 253(a) prohibits local governments from restricting the use of new poles in the public right-of-

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[41] 47 U.S.C. § 253(c) (emphasis added).
[42] *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1271-72 (10th Cir. 2004).
[43] *Level 3 Commc'ns, L.L.C. v. City of St. Louis*, 477 F.3d 528, 531-32 (8th Cir. 2007) (citations omitted).
[44] AT&T Comments at 16.

way.[45] Crown Castle urges the Commission to find that under section 253(a) "the local role should be limited to the issuance of building permits, permits to construct in the right-of-way, and other generally applicable construction permitting requirements."[46] ExteNet, WIA and T-Mobile argue that any requirements imposed on the installation of small cell facilities on utility poles that are not imposed on other telecommunications equipment is barred by section 253(c) because "it is not reasonable or competitively neutral and nondiscriminatory management of the public right-of-way."[47]

By focusing on section 253(a), the Carrier Commenters blithely ignore well-settled law that section 253(c) can save from preemption local regulations that prohibit or have the effect of prohibiting the provision of telecommunications services. AT&T even asks the Commission ignore section 253(c) in its entirety:

> The Commission can and should eliminate the confusion by affirming that Section 253(a)'s "effective prohibition" standard is met when a state or local action materially inhibits or limits the ability of any competitor or potential competitor to provide telecommunications service, *and clarifying those actions that are not saved from preemption by the "safe harbors" in Sections 253(b) and (c)*.[48]

The Carrier Commenters also do not recognize that the section 253(c) safe harbor includes managing the public right-of-way to address aesthetic and other proper municipal concerns:

> [T]he City's interest is limited to protecting the integrity of its historic and cultural resources as well as its parks and open spaces. Whether this interest is grounded in concerns for aesthetics, convenience, property values, tourism, or business development is not the issue. Whatever the underlying concern, the City may assert an interest in protecting its valuable resources and it is permissible to regulate telecommunications on the basis of that interest.[49]

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[45] Mobilitie Comments at 18.
[46] Crown Castle Comments at 29.
[47] ExteNet Comments at 19; *see* WIA Comments at 41-44; T-Mobile Comments at 28-29.
[48] AT&T Comments at 6 (emphasis in original) (citation omitted).
[49] *NextG Networks of Cal., Inc. v. City and Cty. of San Francisco*, 2008 WL 2563213 at *10 (N.D. Cal. 2008); see also *Florida Public Telecommunications Ass'n, Inc. v. City of Miami Beach,* 2001 WL 36406296, at *13 (S.D.Fla., Aug. 17, 2001), *affirmed in part reversed in part on other*

Finally, the Carrier Commenters generally seem to believe that local governments must require the same types of permits for all telecommunications—regardless of the size of those facilities. According to WIA, "the Commission should declare that—at a minimum—local regulations that impose different requirements and conditions on small wireless facilities than all other telecommunications providers in the public right-of-way violate Section 253(a)."[50]

The Commission should reject this misguided construction of section 253 for at least two reasons. First, section 253(a) only preempts local regulations that prohibit or effectively prohibit the provision of telecommunications services. Imposing different requirements on different types of telecommunications providers or their facilities would not, in and of itself, be subject to preemption. Second, such a blanket preemption ignores the differences between so-called small cell facilities and landline facilities—differences that at times can merit different treatment, and save a local ordinance from preemption by virtue of section 253(c). As one court noted in the context of a claim that San Francisco's permitting process for wireless facilities violated California law:

> Given the differences between wireless and wireline providers and the equipment they install-and specifically in light of the community battles that unsightly wireless installations have provoked in cities across the country. . . San Francisco may have made the legitimate choice to subject wireless equipment to more extensive regulation than wireline equipment. . . .[51]

Likewise, pursuant to their authority under section 253(c), local governments may establish different requirements for those types of facilities that, because of their size, location, or design, would have more of an impact on the streetscape. Such permitting requirements are saved by section 253(c).

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grounds, 321 F.3d 1046 (11th Cir. 2003) (finding that ordinance regulating pay telephones in part for aesthetics "relate to Miami Beach's ability to manage the public rights-of-way").

[50] WIA Comments at 41; *see also* T-Mobile Comments at 28-31.

[51] *GTE Mobilnet of Cal., L.P. v. City and Cty. of San Francisco*, 440 F.Supp.2d 1097, 1106 fn. 7 (N.D. Cal. 2006).

D. The Commission May Not Regulate the Use of and Fees Charged for Use of Local Government-Owned Poles,

In its Petition, Mobilitie argues that section 253(c) preempts both the permit and other fees that local governments charge as regulatory agencies and the license fees local governments charge in their proprietary capacity as owners of streetlight poles, traffic signal poles, etc.[52] In the Public Notice, the Bureau also failed to mention the difference between regulatory fees and proprietary fees.[53] The Carrier Commenters also fail to distinguish between those two types of fees.[54] Asking the Commission to regulate local government license fees was not enough for some of the Carrier Commenters. WIA asks the Commission to "address the problem of access to municipally-owned poles."[55] According to the WIA, "[d]enying access to those poles, either explicitly or effectively by imposition of unreasonable fees, is a local government requirement that has the effect of prohibiting the provision of telecommunications services that is not fair and reasonable."[56] T-Mobile urges the Commission to "mak[e] clear that the statutory protections in Sections 253 and 322 apply to requests to site facilities on municipal poles."[57]

In their comments, the Carrier Commenters seem to presume that the Commission has the authority to regulate the fees local governments can charge telecommunications carriers for the use of assets constructed and maintained at taxpayers' expense to serve their communities, and to require local governments to make those poles available for the installation of small cell facilities. Most commenters did not even attempt to explain where the Commission would find such authority, or even address the Second Circuit's decision in *Sprint Spectrum L.P. v. Mills*. That decision recognized that local government control over its property

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[52] *See* Mobilitie Petition at 16-19.
[53] *See* Public Notice at 7-8, 12-14.
[54] *See* Verizon Comments at 17; AT&T Comments at 17; Sprint Comments at 26. Sprint suggests that an appropriate rate for attaching to city-owned traffic signal, streetlight or other poles is $20 per year for wooden poles and $200 per year for "metal, concrete, or fiberglass poles."
[55] WIA Comments at 70.
[56] WIA Comments at 70.
[57] T-Mobile Comments at 30.

is beyond the reach of the Telecommunications Act of 1996. The *Sprint* court found that 47 U.S.C. § 332(c)(7)(B)(iv) did not prohibit a school district from enforcing a lease provision imposing more stringent standards on emissions from its tenant's facilities:

> In sum, we conclude that the Telecommunications Act does not preempt *nonregulatory decisions of a local governmental entity or instrumentality acting in its proprietary capacity*; that the School District acted in a proprietary capacity, not a regulatory capacity, in entering into the Lease agreement with Sprint . . . .[58]

In the *2014 Infrastructure Order*, the Commission noted its agreement with the *Sprint* court when it expressly rejected requests from the industry to regulate the use of local government-owned infrastructure:

> As discussed in the record, courts have consistently recognized that in "determining whether government contracts are subject to preemption, the case law distinguishes between actions a State entity takes in a proprietary capacity—actions similar to those a private entity might take—and its attempts to regulate." As the Supreme Court has explained, "[i]n the absence of any express or implied implication by Congress that a State may not manage its own property when it pursues its purely proprietary interests, and when analogous private conduct would be permitted, this Court will not infer such a restriction." Like private property owners, local governments enter into lease and license agreements to allow parties to place antennas and other wireless service facilities on local-government property, and we find no basis for applying Section 6409(a) in those circumstances. We find that this conclusion is consistent with judicial decisions holding that Sections 253 and 332(c)(7) of the Communications Act do not preempt "non regulatory decisions of a state or locality acting in its proprietary capacity."[59]

Likewise, to the extent San Francisco and other local governments allow wireless providers to install small cells on their poles, under terms and conditions agreed to by the

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[58] *Sprint Spectrum L.P. v. Mills*, 283 F.3d 404, 421 (2d Cir.2002) (emphasis added).

[59] *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies, Report and Order*, 29 FCC Rcd. 12865, 12964 ¶ 239 (F.C.C. Oct. 17, 2014) (the "*2014 Infrastructure Order*"), citing *Qwest Corp. v. City of Portland*, 385 F.3d 1236, 1240 (9th Cir. 2004) (recognizing that Section 253(a) preempts only "regulatory schemes"); *Sprint Spectrum v. Mills*, 283 F.3d 404, 421 (2d Cir. 2002) (finding that Section 332(c)(7) "does not preempt nonregulatory decisions of a local governmental entity or instrumentality acting in its proprietary capacity"); see also *Omnipoint Commc'ns v. City of Huntington Beach*, 739 F.3d 192, 200-01 (9th Cir. 2013) (voter initiative limiting city's ability to lease or sell city-owned property not preempted by 47 U.S.C. § 332(c)(7).)

parties, this Commission cannot find that section 253(c) somehow preempts those agreements. Local government fees for use of their poles are simply beyond the purview of section 253(c).

Nor can the Commission require local governments to allow wireless carriers to install small cells on their poles. In making such an argument, and attempting to distinguish the *Sprint* decision, T-Mobile claims that "[a]ccess to municipal poles . . . is fundamentally different from access to a building or park" because municipal poles "are public property *intended to serve as the locations for public services*.[60] That argument finds no support in the caselaw. It also ignores the substantial differences between wooden utility poles and government-owned metal or concrete streetlight, traffic, or other poles that the carriers claim the Commission should entitle them to use for minimal fees.

First, the public services government-owned poles support are not those offered by for-profit entities like T-Mobile. Those poles support services like street lighting, traffic control, and public transportation. Second, utility poles are designed for the sole purpose of allowing for the installation and maintenance of utility equipment. They are intended to be shared with other utilities and are subject to rate regulation under 47 U.S.C. § 224. Government-owned poles designed to hold streetlight, traffic signals, etc. are not designed to be shared with utility providers of any kind, let alone a small cell facility. Third, wooden utility poles are substantially cheaper than metal and concrete poles used for streetlights and traffic signal lights. Any degradation of those poles by the installation of small cells would require local governments to incur substantial expenses, which would not be covered by license fees equivalent to utility pole attachment rates.

The Commission should reject the attempt by Mobilitie and the Carrier Commenters to find that section 253 somehow limits the fees local governments can charge for use of their poles to install and maintain small cell facilities, or requires local governments to make those poles available to the wireless carriers for such purposes.

[60] T-Mobile Comments at 31 (emphasis in original).

E. The Commission Should Not Adopt a 60-Day Shot Clock for Small Cells on Utility Poles

In Section 6409(a) of the Spectrum Act, Congress determined that a state or local permitting authority "may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station." [61] In the *2014 Infrastructure Order*, the Commission construed Section 6049(a) to require that an application covered by Section 6409(a) must be approved within "60 days from the date of filing, accounting for any tolling . . . [or] the reviewing authority will have violated Section 6409(a)'s mandate to approve and not deny the request, and the request will be deemed granted."[62]

Many of the Carrier Commenters suggest that 60 days should be the "maximum reasonable time" for a local government to approve an application to install small cell facility on a utility pole, because such a facility is "fundamentally similar to a collocation under Section 6409 of the Spectrum Act."[63] In a similar vein, Verizon asks the Commission to "define 'base station' to include structures that historically have been used by state and local governments to support wireless facilities, including utility poles, light stanchions, and water towers."[64]

There is no basis for the Commission to find that installing a small cell facility on a utility pole is an "eligible facilities request" under Section 6409. The Commission has defined the term "eligible facilities request" as follows: "Any request for modification of an existing tower or base station that does not substantially change the physical dimensions of such tower or base station . . . ."[65] In order for the citing of a small cell facility to be an eligible facilities request, therefore, the Commission must find that a utility pole is a "tower" or "base station." The Commission has defined the term "base station" as a "structure or equipment at a fixed

[61] 47 U.S.C. § 1455(a).
[62] *2014 Wireless Infrastructure Order*, 29 FCC Rcd 12957, at ¶ 216.
[63] WIA Comments at 60; *see also* Sprint Comments at 41; Crown Castle Comments at 39.
[64] Verizon Comments at 29.
[65] 47 C.F.R. § 1.40001(b)(3).

location that enables Commission-licensed or authorized wireless communications between user equipment and a communications network."[66] The Commission has defined the word "tower" as "[a]ny structure built for the sole or primary purpose of supporting any Commission-licensed or authorized antennas and their associated facilities." [67]

Under these definitions, a utility pole is neither a "base station" nor a "tower." A utility pole does not "enable Commission-licensed or authorized wireless communications," nor was it "built for the sole purpose of supporting" such communications. A utility pole that has not previously been used to support wireless facilities can simply not be the subject of an "eligible facilities request." For this reason too, the Commission should reject Verizon's request that the Commission find that the term "base station" includes municipally-owned poles that are not being used to support wireless facilities.

San Francisco's concern about such an overly broad and illogical construction of the term eligible facilities request is not merely theoretical. It could affect San Francisco's review of hundreds of applications for permits to install wireless facilities on utility and City-owned poles. The Carrier Commenters have not provided the Commission with either a legal basis or a compelling reason for the Commission to establish a separate 60-day shot clock for small cells.

[66] 47 C.F.R. § 1.40001(b)(1).
[67] 47 C.F.R. § 1.40001(b)(9).

IV. CONCLUSION

As discussed in San Francisco's comments and above, San Francisco does not see the need for the Commission to take any action with respect to local government regulation over the installation of small cell facilities in the public right-of-way.

Dated: April 7, 2017

DENNIS J. HERRERA
City Attorney
THERESA L. MUELLER
Chief Energy and Telecommunications Deputy
WILLIAM K. SANDERS
Deputy City Attorney

By: /S/
WILLIAM K. SANDERS